State of Michigan
In The
Supreme Court

APPEAL FROM THE MICHIGAN COURT OF APPEALS

EVA DEVILLERS, as Guardian and Conservator of
MICHAEL J. DEVILLERS,

Plaintiff-Appellee, Supreme Court No. 126899

v

AUTO CLUB INSURANCE ASSOCIATION,

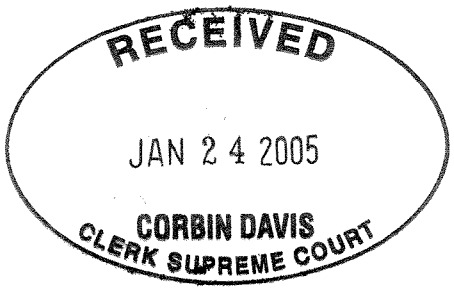
Defendant-Appellant.

Court of Appeals No: 257449
Oakland County Circuit Court No: 02-045287-NF

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE



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STATEMENT OF JURISDICTIONAL BASIS

ACIA appeals from the July 7, 2004, Order denying Defendant's Motion for Partial Summary Disposition and from the July 30, 2004, Order and Opinion denying Defendant's Motion for Reconsideration. Those are not final orders as defined by MCR 7.202(7)(a). The Court of Appeals denied leave to appeal in an order entered September 21, 2004. This Court granted leave to appeal in an order entered November 29, 2004. This Court has jurisdiction of this application by virtue of MCR 7.301(A)(2).

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STATEMENT OF STANDARD OF REVIEW

This case presents a question of statutory construction, which this Court reviews de novo. Roberts v Mecosta County General Hospital, 466 Mich 57, 63; 642 NW2d 663 (2002).

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STATEMENT OF QUESTIONS PRESENTED

I. WAS LEWIS WRONGLY DECIDED BECAUSE IT IS CONTRARY AND INIMICAL TO THE LEGISLATIVE INTENT SET FORTH IN THE UNAMBIGUOUS LANGUAGE OF MCL 500.3145(1)?

The trial court answered, "No".

The Court of Appeals denied leave to appeal.

Plaintiff-Appellee contends the answer should be, "No".

Defendant-Appellant contends the answer should be, "Yes".

II. SHOULD THIS COURT GIVE EITHER FULL OR LIMITED RETROACTIVE EFFECT TO ITS DECISION OVERRULING THE JUDICIAL TOLLING DOCTRINE?

The trial court was not presented with this question.

The Court of Appeals denied leave to appeal.

Plaintiff-Appellee contends the answer should be, "No".

Defendant-Appellant contends the answer should be, "Yes".

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STATEMENT OF FACTS

On September 30, 2000, MICHAEL DEVILLERS, then age 17, was seriously injured in an auto accident. (7a). He sustained a fractured pelvis, a ruptured spleen, traumatic brain injury, a broken tooth, and a number of small lacerations and cuts. (33a, 57a, 78a).

MICHAEL was in the hospital for approximately 20 days (33a, 91a, 140a), after which he was discharged home (58a, 140a). For awhile he went to Stepping Stones outpatient rehabilitation facility. (34a, 140a). A driving service provided the transportation. (34a). A visiting nurse would stop by the house in the morning to take his blood pressure and check up on him. (37a, 118a, 141a).

MICHAEL was unable to get around without help for three months or so after his return home. (33a, 118a). During that time his mother, EWA DEVILLERS, cared for him. (37a, 39a, 141a). ACIA paid her for home health care (basic supervision) at the rate of $10/hour for the period from October 20, 2000, to February 14, 2001. (90a). The total payments were approximately $21,000. (91a). On February 14, 2001, ACIA received a prescription saying that MICHAEL was clear to function without supervision. (98a). ACIA ceased paying MRS. DEVILLERS for home attendant care effective February 15, 2001. (214a).

MRS. DEVILLERS provided other services for MICHAEL. She drove him to and from high school (20 miles one way). (8a-9a,

39a, 119a). She also made his doctor appointments and drove him to them. (37a).

Upon his return to high school, MR. DEVILLERS required a tutor. (9a, 59a). ACIA also paid for that service. (59a).

The Complaint in the instant case was filed on November 12, 2002. (177a). MRS. DEVILLERS seeks money for services allegedly rendered to MICHAEL for which she has not been paid. (144a-145a, 154a).[1] Plaintiff also seeks payment of certain outstanding medical bills which HAP refused to pay. (82a).

In its Answer, ACIA pleaded as an Affirmative Defense that Plaintiff's claim is limited by the one-year-back rule of §3145(1) of the No-Fault Act. (183a).

On May 19, 2004, ACIA filed a Motion for Partial Summary Disposition. (186a). Therein, ACIA argued:

(1) For purposes of her claim for nonpayment or underpayment of attendant care services, Plaintiff, not MICHAEL, was the claimant. As such, she was bound by §3145(1). (191a-195a).

(2) For purposes of the entire claim, Plaintiff could not invoke the insanity tolling provision of MCL 600.5851(1), because the 1993 amendment to that statute rendered it inapplicable to §3145(1). (195a-200a).[2]

---

[1]It appeared that MRS. DEVILLERS originally was also claiming underpayment for the period from October 20, 2000, to February 14, 2001. (90a-95a). However, in response to ACIA's Motion for Partial Summary Disposition, she voluntarily limited her claim to services rendered after February 14, 2001. (212a).

[2]On July 13, 2004, the Court of Appeals issued a published opinion holding that §5851(1) of the RJA does not apply to no-fault claims for services rendered subsequent to October 1, 1993. Cameron v ACIA, 263 Mich App 95; 687 NW2d 354 (2004), lv app pending.

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In her response (201a), Plaintiff declined to rely on §5851(1), voluntarily limiting her claim to services and medical care rendered on and subsequent to February 15, 2001. (212a). Her primary argument was that §3145(1) was tolled from February 15, 2001 (the date that ACIA cut off attendant care benefits) to October 7, 2002 (the date of the letter [214a] memorializing the cutoff). (209a-211a). The basis for that argument was the judicial tolling doctrine promulgated in Lewis v DAIIE, 426 Mich 93; 393 NW2d 167 (1986).

At the July 7, 2004, hearing (216a) (and in its Motion for Reconsideration [222a]), ACIA argued that: (1) Lewis was wrongly decided; and (2) In any event, Lewis cannot rationally be applied to the instant case.

At the conclusion of the hearing, the trial court, Hon. Nanci J. Grant, denied the motion on the basis of judicial tolling. An order to that effect (226a) was entered that day. On July 12, 2004, ACIA filed a Motion for Reconsideration (222a), which the trial court denied in an order (227a) entered July 30, 2004.

On August 20, 2004, ACIA filed an Emergency Appeal to the Court of Appeals. (Court of Appeals No. 257449). On August 25, 2004, ACIA filed a "bypass" application for leave to appeal to this Court.

On September 21, 2004, the Court of Appeals entered an order (228a) denying leave to appeal. Three days later, this Court

entered an order (229a) staying trial. On November 29, 2004, this court entered an order (230a) granting leave to appeal.

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INTRODUCTION

The instant case is one of dozens currently pending involving brain-injured persons in which claimants seek to recover benefits for services rendered months, years, and even decades beyond the one-year-back limitation the Legislature imposed in §3145(1) of the No-Fault Act. Initially, the linchpin of these cases was the plaintiffs' invocation of MCL 600.5851(1), the minority/insanity tolling provision of the RJA.

The problem with these cases is that once the one-year-back rule was eliminated, claims were being presented for alleged nonpayment or underpayment[3] of 24/7 home attendant care going back **years**. Multi-million dollar claims are not uncommon, with the "smaller" claims amounting to several hundred thousands of dollars.

Needless to say, lawsuits claiming such amounts rarely go to trial. The larger the claim, the greater the pressure on the insurer to settle. The perversity of the situation in such cases is that a very small percentage of the claim falls within the one-year-back period prescribed by §3145(1). The million dollar tail wags the litigation dog.

In a number of cases, ACIA argued that the 1993 amendment to §5851(1) of the RJA eliminated its applicability to §3145(1) of

[3]In some cases, home attendant care was paid for years at a rate to which the insurer and the family agreed, only to have a newly retained attorney claim that the rate should have been higher to reflect "market" rates.

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the No-Fault Act.[4] A frequent (soon to be universal) response to that argument in these cases is that the statute of limitations is tolled under Lewis v DAIIE, 426 Mich 93; 393 NW2d 167 (1986). Actually, the case most frequently cited is Johnson v State Farm Mutual Automobile Ins Co, 183 Mich App 752; 455 NW2d 420 (1990), which, plaintiffs argue, extends Lewis to create tolling:

> ". . . for that period of time from which defendant knew or reasonably should have known that plaintiff was entitled to benefits under the automobile policy until such time as defendant either formally and explicitly denied liability for benefits **or affirmatively informed plaintiff that she might be entitled to benefits under the policy and requested that she file a formal claim of benefits under the policy**."

Id. at 762-63 (emphasis added). The emphasized language purportedly authorizes temporally unlimited recovery **to people who never even made a claim for such benefits**.

ACIA has responded to that argument in various ways, but the fundamental problem is that Lewis was wrongly decided.

On July 13, 2004, the Court of Appeals issued a published opinion holding that the 1993 amendment to §5851(1) eliminated its applicability to first-party no-fault claims for services rendered after October 1, 1993. Cameron v ACIA, 263 Mich App 95; 687 NW2d 354 (2004), lv app pending.

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[4]See Adams v ACIA, Isabella County Circuit Court No. 03-2291-NF; Bearden v DAIIE, Court of Appeals No. 255735; Cooper v ACIA, Court of Appeals No. 254659; Dowadait v State Farm, Wayne County Circuit Court No. 04-402764-NF; Gulley v ACIA, Court of Appeals No. 256777; Palarchio v ACIA, Wayne County Circuit Court No. 02-238086-NF; Schmitz v Citizens & ACIA, Court of Appeals No. 256599; Valleriani v ACIA, Macomb County Circuit Court No. 03-2523-NI).

The instant case is the first in which a trial court has invoked Lewis to circumvent Cameron. It will undoubtedly not be the last. And with the extension of that case in Johnson, it is difficult to conceive of a case in which Lewis/Johnson could not be invoked.

The villain of the piece, of course, is Lewis, which spawned Johnson. It is time to relegate both cases to the judicial dustbin and to restore the operation of the no-fault system to the temporal parameters explicitly set forth by the Legislature.

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I. LEWIS WAS WRONGLY DECIDED BECAUSE IT IS CONTRARY AND INIMICAL TO THE LEGISLATIVE INTENT SET FORTH IN THE UNAMBIGUOUS LANGUAGE OF MCL 500.3145(1).

The statute that ACIA invokes reads in pertinent part as follows:

> "(1) **An action for recovery of personal protection insurance benefits payable under this chapter** for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, **the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced**."

MCL 500.3145(1) (emphasis added). The sole basis on which the trial court avoided application of the one-year-back provision of that statute was the judicial tolling doctrine promulgated in Lewis v DAIIE, 426 Mich 93; 393 NW2d 167 (1986).

In Lewis, the plaintiff was injured in an auto accident on November 13, 1978. On July 11, 1979, the plaintiff's attorney submitted an application for benefits. On July 19, 1979, the insurer requested further medical reports and the name of another potential insurer. In September and October, the insurer responded to inquiries from a health care provider by saying it was awaiting information from the plaintiff's attorney. Id. at 95-97.

On November 14, 1979, the plaintiff's attorney wrote the insurer asking whether the claim would be paid and, if not, whether he could have written reasons for the denial. On Novem-

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ber 19, 1979, the insurer responded that the file was being reviewed for possible payment. Id. at 97.

On February 22, 1980, the plaintiff filed suit. The insurer moved for accelerated judgment on the basis of §3145(1). The motion was denied. The jury returned a verdict for the plaintiff. The Court of Appeals affirmed. Id. at 97.

This Court also affirmed. Relying on its decisions in Tom Thomas Organization, Inc v Reliance Ins Co, 396 Mich 588, 242 NW2d 396 (1976), and In re Certified Question: Ford Motor Co v Lumbermens Mutual Casualty Co, 413 Mich 22, 319 NW2d 320 (1982), the majority imposed on §3145(1) the qualification that the running of the statutory period was tolled from the time that a claimant submits a specific claim for benefits until the time that the insurer formally denies the claim. 426 Mich at 100, 101.

ACIA submits that Lewis was wrongly decided for the reasons set forth in Justice Brickley's dissent. However, in order to appreciate fully the infirmity of the Lewis holding, it is necessary to analyze the decisional authority upon which it was premised.

In Tom Thomas, supra, the plaintiff sought recovery under an inland marine fire policy for a loss which occurred on November 14, 1971. 396 Mich at 591. The plaintiff reported the loss on January 20, 1972, and filed a proof of loss on March 7, 1972.

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Id. at 593. The insurer denied the claim on June 22, 1972. The plaintiff sued on March 16, 1973. Id. at 591.

The policy provided that suit could not be filed more than 12 months after discovery of the occurrence which caused the loss. 369 Mich at 591-92. The policy also provided that payment was not due until 60 days after proof of loss was accepted by the insurer. Id. at 593.

Citing authority from New Jersey, Peloso v Hartford Fire Ins Co, 56 NJ 514; 267 A2d 498 (1970), the Tom Thomas majority held that the contractual period of limitations was tolled "from the time the insured gives notice until the insurer formally denies liability". Id. at 595-97.

The dissent criticized the majority opinion, inter alia, as follows:

> "While we express no opinion concerning the wisdom of this approach, **we believe the adoption of this change in the law should be accomplished through the legislative process rather than by judicial fiat. To adopt such a rule of law is, in effect, to rewrite the contract** in favor of the party which, for a six-month period, was guilty of sleeping in its bargain-for rights."

Id. at 601 (Lindemer, J., dissenting) (emphasis added).

In the Ford Motor Company case, this Court applied the Peloso/Tom Thomas approach to a claim under the statutory fire insurance policy, MCL 500.2832 (since repealed). 413 Mich at 28-29. The majority characterized a contrary prior decision, Dahrooge v Rochester German Ins Co, 177 Mich 442; 143 NW2d 608 (1913), which "focused upon the 'plain, clear and simple lan-

guage' of the limitation provision", as being premised upon "narrow reasoning" and a "narrow linguistic approach". 413 Mich at 33, 35-36.

In his dissent, Justice Ryan emphasized that the majority was not enforcing legislative intent, but rather was rewriting the statute:

> "Even if the Court's reasoning were sound, that inability to file suit until the proof of loss is filed, plus 60 days, somehow reduces the cutoff period of filing suit from 12 months to a lesser period, a conclusion the logic of which escapes me, **the fact is that the Legislature has so declared it**."
>
> * * * *
>
> "First, **the plain, simple, direct and unambiguous language of the limitation provision of the statute**, whether read alone or in context with the other portions of the law, **belies any suggestion that a tolling provision was impliedly enacted by the Legislature or intended by it** and precludes, in the light of familiar rules of statutory construction, any interpretation or construction of the statute to create one."
>
> * * * *
>
> "**It is difficult to imagine statutory language more plain, direct, simple and unambiguously clear than that. It speaks of no tolling period**. While presumably the Court would have no disagreement with that observation, it claims that upon a proper construction and interpretation of the statute as a whole, there emerges a legislative purpose that the tolling provision which the Court announces was intended by the Legislature all along."

413 Mich at 48, 50, 51 (emphasis added).

With remarkable prescience, Justice Ryan observed:

> "Perhaps **the real danger in what the Court has done today is** not so much in its departure from the most axiomatic of all principles of statutory construction, or in the usurpation of the legislative prerogative, as **in the precedent that has been laid down for what I strongly suspect will be the inevitable next step**.

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"**What now is to stop or even delay the rewriting of all other statutes of limitations enacted by the Legislature**?

"A court with a fairly consistent track record of announced disapproval of statutes of limitations in general, and short ones in particular, can well be understood to have no hesitancy to construe and interpret into all statutes of limitation tolling provisions which suspend the running of the statute in any case for the period between the time a claimant makes a demand upon an insurance company and the company 'formally' denies liability."

Id. at 55-56 (emphasis added).

Indeed, that is exactly what came to pass in Lewis. In dissent, Justice Brickley echoed the observations of his philosophical predecessors:

"Although the majority may further one of the broad purposes of the no-fault act -- avoiding litigation -- **this judicial amendment of a clear legislative directive will have a pernicious long-term effect**. Unless statutory language is ambiguous or a constitutional mandate compels revision, the well-settled principle of this Court is that '**the explicit declaration of the Legislature is the law, and the courts must not depart from it**.'"

* * * *

"Section 3145 is clear in its directive that a claimant cannot recover benefits for losses incurred more than one year prior to the commencement of the suit; not one year plus the period of time between making the claim and the denial of the claim as the majority holds."

426 Mich at 104-05, 105 (emphasis added).

Justice Brickley pointedly criticized the majority for substituting its policy views for those of the Legislature:

"Although the majority approach may further the general policy of reducing litigation, the statute is not necessarily inconsistent with other purposes and provisions of the act. For example, §§3142 and 3148 impose sanctions upon an insurer for late payments. Thus, §3145 may be viewed as a complementary provision which 'sanctions' an insured who is not diligent in pursuing a claim. [Citations omitted]. This court

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> was not privy to all of the arguments and purposes presented to the Legislature when it drafted these specific tolling requirements. **When statutory language is as clear as it is here, it is outside our province to second-guess the Legislature as to which policy is paramount in regard to §3145**."
>
> * * * *
>
> "Absent ambiguous language or a constitutional infirmity, **the judiciary should not substitute policy for explicit directives of the Legislature**, especially when, as here, **the language is clear and not necessarily inconsistent with other purposes and sections of the act**."

Id. at 107-08, 108 (emphasis added).

It is thus apparent that Lewis (as well as the case law upon which it relied) is deeply flawed by a refusal to apply unambiguous statutory language as written, and by substitution of the court's view of sound policy for the intent of the Legislature as embodied in that language. Recent decisions from this Court make clear that such an approach is no longer viable in this State.

In People v McIntire, 461 Mich 147; 599 NW2d 102 (1999), this Court adopted as its own the dissenting opinion of then-Judge Young in the Court of Appeals:

> "'These traditional principles of statutory construction thus **force courts to respect the constitutional role of the Legislature as a policy-making branch of government and constrain the judiciary from encroaching on this dedicated sphere of constitutional responsibility**. Any other nontextual approach to statutory construction will necessarily invite judicial speculation regarding the probable, but unstated, intent of the Legislature with the likely consequence that a court will impermissibly substitute its own policy preferences."

461 Mich at 153 (emphasis added).

Since then, the appellate courts of this State have repeatedly reaffirmed that if the text of the statute is unambiguous, a

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court may not impose a gloss which substitutes its policy preferences for those of the Legislature as expressed in the statutory language. E.g., Robertson v Daimler Chrysler Corp, 465 Mich 732, 758, 641 NW2d 567 (2002); Hanson v Mecosta County Road Commissioners, 465 Mich 492, 504, 638 NW2d 396 (2002); Nawrocki v Macomb County Road Commissioners, 463 Mich 143, 150-51, 615 NW2d 702 (2000); McGhee v Helsel, 262 Mich App 221, 224, 686 NW2d 6 (2004); Maier v General Telephone Co, 247 Mich App 655, 664, 637 NW2d 263 (2001), lv den, 466 Mich 879 (2002).

In Robinson v City of Detroit, 462 Mich 439; 613 NW2d 307 (2000), Justice Corrigan articulated the **obligation** of the Court to correct usurpations of legislative prerogative:

> "To preserve the legitimacy of the judicial branch, this Court must not exceed the limits of its constitutional authority. I agree that too rapid change in the law threatens judicial legitimacy, as it threatens the stability of any institution, but **the act of correcting past rulings that usurp power properly belonging to the legislative branch** does not threaten legitimacy. Rather, it **restores legitimacy**. Simply put, our duty to act within our constitutional grant of authority is paramount. **If a prior decision of this Court reflects an abuse of judicial power at the expense of legislative authority, a failure to** recognize and **correct that excess**, even if done in the name of stare decisis, **would perpetuate an unacceptable abuse of judicial power**."

462 Mich at 472-73 (Corrigan, CJ, concurring) (emphasis added).

Lewis is as dramatic an example of judicial legislation as one is likely to see. The majority did not even pretend to give effect to the statute as written. Indeed, it came close to explicitly acknowledging that fact.

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Even though it found no ambiguity in §3145(1), it reached a result inconsistent with its plain language on the following basis:

> "**We believe** this result effectively preserves the Legislature's purpose."

426 Mich at 101 (emphasis added). The justification for that result was an exposition of the public policy considerations that **the Court** deemed most important. Id. at 101-02.

In short, it is beyond question that the Lewis decision embodied precisely the type of "abuse of judicial power at the expense of legislative authority" that this Court decried in Robinson. Lewis should be overruled.

However, overruling Lewis will not eradicate its effect unless this Court also specifically overrules Johnson v State Farm Mutual Automobile Ins Co, 183 Mich App 752; 455 NW2d 420 (1990).

In Johnson, the plaintiff's husband was killed in an automobile accident while driving a motorcycle insured by the defendant. 183 Mich App at 754. The defendant also insured the decedent's auto. Id. Both policies were written by the same agent, with whom the decedent had dealt for 20 years. Id.

The plaintiff, the decedent's widow, who at all pertinent times was represented by counsel, id. at 766, made a claim for uninsured motorist benefits. Id. at 754-55. She met with the defendant's adjuster six months after the accident and asked whether she was entitled to benefits under the auto policy. Id.

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at 761-62, 763 n 3. She received no response. Id. at 762. The Court of Appeals held that her inquiry was a sufficiently specific claim for benefits within the meaning of Lewis. Id. at 761.

Had the opinion stopped there, it would have been bad enough. Simply asking whether one is entitled to any benefits of any kind is not the specific claim for specific benefits that Lewis would seem to require.[5] However, Johnson then went well beyond Lewis and provided an alternative judicially invented manner in which to avoid §3145(1):

> "In the alternative, we would hold that, even if tolling under *Lewis, supra*, is not applicable to the case at bar, **the one-year-back rule should nevertheless be tolled for that period from which defendant** knew or **reasonably should have known that plaintiff was entitled to benefits** under the automobile policy **until such time as defendant** either formally and explicitly denied liability for benefits or **affirmatively informed plaintiff that she might be entitled to benefits** under the policy **and requested that she file a formal claim of benefits under the policy**."

183 Mich App at 762-63 (emphasis added).

The Johnson panel characterized this new rule as a "corollary of those principles" on which Lewis was premised. Id. at 763. At no point, however, did the panel attempt to square its

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[5] "The *Welton* opinion stated that, if such tolling were adopted, it would begin only when a **claim for specific benefits** was submitted to the insurer."

* * * *

"We now reach the question that the *Welton* Court reserved and conclude that the one-year-back rule of §3145 is tolled from the date of a **specific claim for benefits** to the date of a formal denial of liability."

Lewis, supra at 100, 101 (emphasis added).

holding with the statutory requirement that a claimant must supply "reasonable proof of the fact and of the amount of loss sustained" as a precondition to an enforceable entitlement to benefits. MCL 500.3142(2).

If Lewis constituted judicial legislation effectively amending §3145(1), Johnson was a judicial repealer of §3142(2). Henceforth, claimants may simply notify an insurer of the nature and severity of their injuries, and §3145(1) ceases to operate as to any benefits which they **fail** to request.

In sum, this Court should overrule both Lewis and Johnson, and direct that §3145(1) be enforced as the Legislature intended.

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II. THIS COURT SHOULD GIVE EITHER FULL OR LIMITED RETROACTIVE EFFECT TO ITS DECISION OVERRULING THE JUDICIAL TOLLING DOCTRINE.

In its order granting leave to appeal (230a), this Court directed the parties to brief whether a decision overruling Lewis should be given prospective effect only.[6] For reasons set forth below, this Court should give either full or limited retroactivity to such a holding.

General Principles and Historical Application

The general rule is that judicial decisions are given full retroactive effect. E.g., Pohutski v City of Allen Park, 465 Mich 675, 695, 641 NW2d 219 (2002); Hyde v University of Michigan Board of Regents, 426 Mich 223, 240, 393 NW2d 847 (1986). An exception to that rule may exist where the decision in question overrules settled precedent or decides an issue of first impression whose resolution was not clearly foreshadowed. E.g., Lindsey v Harper Hospital, 455 Mich 56, 68, 564 NW2d 861 (1997); People v Phillips, 416 Mich 63, 68, 330 NW2d 366 (1982).

[6]A statement of the standard of review is superfluous in this context. However, to the extent it may be of interest, the issue presents a question of law. E.g., Adams v Department of Transportation, 253 Mich App 431, 434-35; 655 NW2d 625 (2002), lv den, 468 Mich 864 (2003).

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The language used in the Michigan decisions addressing this issue is not as precise as it might be.[7] Accordingly, ACIA will define its terms as follows:

(1) **Pure prospectivity** denies application of the holding even to the parties before the Court, limiting its reach to causes of action either arising or filed after the date of decision. E.g., Pohutski, supra at 699. See also Riley v Ameritech Corp, 147 F Supp 2d 762, 771 (ED Mich 2001).[8]

(2) **Full retroactivity** would allow application of the holding to all cases, including terminated cases which may be subject to collateral or other manner of attack. See Linkletter v Walker, 381 US 618, 622 n 5, 85 S Ct 1731, 14 L Ed 2d 601 (1965); Annotation: Shapiro, Prospective or Retroactive Operation of Overruling Decision, 10 ALR 3d 1371, §§1[a], 2. See MCR 2.612(C)(1)(e) (relief from judgment based on reversal of prior judgment on which it was based if motion filed "within a reasonable time").

(3) **Limited retroactivity** encompasses a variety of options, including:

(a) Application only to the parties before the Court and to cases either arising, Sherbutte v City of Marine City, 374 Mich 48, 53, 130 NW2d 920 (1964); Parker v City of Port Huron, 361 Mich 1, 28 (1960), filed, Wilson v Doehler-Jarvis Division of National Lead Co, 358 Mich 510, 517, 100 NW2d 226 (1960); Bricker v Green, 313 Mich 218, 236, 21 NW2d 105 (1946), or tried, People v Rich, 397 Mich 399, 405, 245 NW2d 24 (1976), after the date of decision;

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[7]The compendium of cases cited herein is illustrative and does not purport to be exhaustive. The point of this portion of the discussion is to provide an analytical framework, not to present decisions mandating one result or the other in the instant case. Indeed, given the flexibility of the procedural device under discussion, there is no precedent requiring a specific result. The matter is ultimately entrusted to the sound discretion of this Court in light of the substantive holding and its context.

[8]In Wayne County v Hathcock, 471 Mich 445; 684 NW2d 765 (2004), this Court expressed doubt as to whether it is constitutionally legitimate for this Court to render purely prospective opinions, because they appear to be unauthorized advisory opinions. Id. at 484 n 98.

(b) Application to the parties before the Court, to pending cases in which the issue is raised and preserved, and to future cases. E.g., Wayne County v Hathcock, supra at 484; Gladych v New Family Homes, 468 Mich 594, 606-07, 664 NW2d 705 (2003);

(c) Application to all cases pending in trial courts and to appellate cases in which the issue has been raised and preserved, as well as future cases. E.g., Lesner v Liquid Disposal, Inc, 466 Mich 95, 109, 643 NW2d 553 (2002); Martin v White Pine Copper Co, 378 Mich 37, 39, 44, 142 NW2d 681 (1966); Myers v Genesee County Auditor, 375 Mich 1, 11, 133 NW2d 190 (1965).

Which of those options is appropriate turns on an analysis of the particular issue and the context in which it is decided.

Application of Principles to the Instant Case

A question of retroactivity arises only where the decision overrules clear and settled precedent. Curtis v City of Flint, 253 Mich App 555, 564; 655 NW2d 791 (2002). See Pohutski, supra at 696. The mere fact that this Court overrules one of its prior decisions is not dispositive; the question is whether the overruled case law was clear and uncontradicted. Adams v Department of Transportation, 253 Mich App 431, 436; 655 NW2d 625 (2002), lv den, 468 Mich 864 (2003). An issue of retroactivity arises only where the overruling decision was unexpected or indefensible in light of the law existing at the time the underlying facts developed. Curtis, supra at 564.

In the context of giving retroactive effect to this Court's decision in Robinson v City of Detroit, 462 Mich 439; 613 NW2d 307 (2000), the Court of Appeals recently observed:

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> "It can hardly be considered 'unexpected' or 'indefensible' that the Court would reverse a decision that was contrary to the clear and unambiguous language of the statute."

Curtis v City of Flint, supra at 566.

As was demonstrated above, this Court's decision in Lewis went well beyond merely misinterpreting the language of a statute. Indeed, one of the signators of the Lewis majority opinion recently acknowledged that it was not premised on the language of the statute, but rather on the Court's view of "preserving legislative purposes". Secura Ins Co v Auto-Owners Ins Co, 461 Mich 382, 389 n 1; 605 NW2d 308 (2000) (Cavanagh, J, dissenting). That same opinion expressly noted that neither §3145(1) nor §3145(2) contains any language allowing tolling:

> "Comparing the language of these provisions, **neither appears to allow tolling more or less than the other**."

Id. at 390 (emphasis added).

It is also significant that the majority opinion in Secura Ins Co signaled that Lewis itself was inconsistent with the holding it was rendering:

> "The correctness of the holding in the divided *Lewis* decision is not before us."

461 Mich at 386 n 5.

Thus, a persuasive argument can be made that overruling Lewis should not even raise a question of retroactivity. Rather than announcing a new rule of law, such a holding would "return[] our law to that which existed before [Lewis] and which has been mandated by [the express language of §3145(1)] since [it was

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enacted]". Wayne County v Hathcock, 471 Mich at 484 (bracketed material inserted in lieu of original language).

However, in the interest of full exposition, ACIA will demonstrate that even if retroactivity analysis is warranted, it compels a conclusion that a decision overruling Lewis should apply to all cases currently pending in a trial court and to all cases pending on appeal in which the issue has been raised and preserved.

To determine whether to give retroactive effect to a decision overruling clear and settled precedent, this Court employs a three-part test derived from Linkletter v Walker, supra:

> (1) Whether the purpose of the new rule can be served by prospective application;
>
> (2) Whether extensive reliance on the old rule would render retroactive application substantially unfair; and
>
> (3) Whether retroactive application would have an adverse effect on the administration of justice.

Pohutski, supra at 696.

1. The Purpose of the New Rule Cannot Be Served by Prospective Application.

In Linkletter, supra, the United States Supreme Court articulated the focus of the this portion of the analysis as follows:

> "Once the premise is accepted that we are neither required to apply, nor prohibited from applying a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."

381 US at 629.

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The one-year-back provision of §3145(1) serves two important purposes.

First, and most obvious, it requires claimants to pursue their claims in timely fashion. Pendergast v American Fidelity Fire Ins Co, 118 Mich App 838, 841-42, 325 NW2d 602 (1982); Allen v Farm Bureau Ins Co, 210 Mich App 591, 599, 534 NW2d 177 (1995). The no-fault injury reparations scheme involves the processing of tens of thousands of claims per year for different products, services, and accommodations. That volume and the importance of insurers having a reasonable opportunity to investigate claims while they are still fresh are the basis for the relatively short limitations period.

However, there is a second and equally important purpose served by §3145(1): The maintenance of a fiscally viable no-fault system while keeping premiums at an affordable level. Shavers v Attorney General, 402 Mich 554, 596, 600; 267 NW2d 72 (1978). That purpose is brought into sharp relief by the context in which this issue comes to this Court.

The instant case is one of dozens involving brain-injured persons or minors in which claimants seek to recover benefits for services rendered months, years, and even decades beyond the one-year-back limitation the Legislature imposed in §3145(1) of the No-Fault Act.[9]

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[9]The offices of the undersigned attorneys of counsel alone are or have been involved in the following such cases: Bearden v ACIA,
(continued...)

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The problem with these cases is that once the one-year-back rule is eliminated per Lewis/Johnson, claims can be maintained for alleged nonpayment or underpayment of 24/7 home attendant care going back **years**. Multi-million dollar claims are not uncommon, with the "smaller" claims amounting to several hundred thousands of dollars.

The motivating factor behind the insurers' appeals in these cases is that the no-fault system is hemorrhaging tens of millions of dollars per year on long-stale claims. The upward pressure on premiums is self-evident. Not only must the motoring public finance benefits payable now and in the future, they must also subsidize the payment of tens of millions of dollars on claims which should have been asserted years or decades ago.

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[9](...continued)
Supreme Court No. 127676-7; Cameron v ACIA, Supreme Court No. 127018; Cooper v ACIA, Supreme Court No. 127848; Garon v ACIA, Supreme Court No. 127774; Schmitz v ACIA, Supreme Court No. 127034; Gulley v ACIA, Court of Appeals No. 259012; Palarchio v ACIA, Court of Appeals No. 258992; Adams v ACIA, Isabella County Circuit Court No. 03-2291-NF; Bartolo v ACIA, Wayne County Circuit Court No. 02-243736-NF; Ciaramitaro v AAA Michigan, Macomb County Circuit Court No. 03-3042-NF; Cicilian v ACIA, Macomb County Circuit Court No. 03-2551-NI; Dowidait v State Farm, Wayne County Circuit Court No. 04-402764-NF; Harwood v State Farm, Wayne County Circuit Court No. 03-313376-NF; Ingle v ACIA, Wayne County Circuit Court No. 02-235656-NF: Kohn v ACIA, Wayne County Circuit Court No. 03-338344-NF; Love v State Farm, Wayne County Circuit Court No. 03-307417-NF; Maenza v ACIA, Macomb County Circuit Court No. 02-1991-CK; Magness v Frankenmuth & ACIA, Genesee County Circuit Court No. 03-75462-NF; Moon v ACIA, Macomb County Circuit Court No. 03-2902-NF; Murphy v ACIA, Washtenaw County Circuit Court No. 02-1204-NF; Valleriani v ACIA, Macomb County Circuit Court No. 03-2523-NI; Wagner v ACIA, Oakland County Circuit Court No. 03-047619-NF; Yorkey v ACIA, Washtenaw County Circuit Court No. 03-1109-NF; Zahodnic v ACIA, Oakland County Circuit Court No. 03-053230-NF.

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Thus, the purpose of the statutory rule which ACIA is asking this Court to enforce -- the one-year-back limitation on recovery promulgated by the Legislature -- cannot be meaningfully served unless it applies to cases pending in the trial courts. Prospective application will leave unchecked the massive adverse consequences resulting from the very error which the new rule seeks to correct. This factor weights very heavily, if not decisively, in favor of limited retroactivity.

2. No Legitimate and Substantial Reliance Interest Will Be Harmed by Limited Retroactivity.

The effect of overruling Lewis will be to cut off entitlement to benefits allegedly payable more than one year prior to filing suit. The only persons who could suffer detriment are: (1) those who have made a claim for the specific benefits at issue (as Lewis requires) and who have not received a formal denial, and (2) those who (like Plaintiff) have not made such a claim, but who rely on an interpretation of Lewis (see Johnson, supra) which does not require them to do so.

The latter category of claimants can have no justifiable reliance on Lewis. Even leaving aside §3145(1), the No-Fault Act specifically requires a claimant to submit reasonable proof of the fact and amount of loss in order to recover benefits. MCL 500.3142(2). This Court recently reaffirmed that principle even in the context of judicial tolling:

> "This Court has recognized this in other insurance contexts that '**[u]ntil a specific claim is made, an insurer has no way of knowing what expenses have been incurred, whether those expenses are covered losses,**

> **and indeed, whether the insured will file a claim at all**.' *Welton v Carriers Ins Co*, 421 Mich 571, 579; 365 NW2d 170 (1985). Indeed, in considering the whole topic of insurer denial of a claim our Court has said **it is 'illogical to expect the insurer to formally "deny" an as yet unperfected claim**.' *Id.*; see also *Lewis v DAIIE*, 426 Mich 93; 393 NW2d 167 (1986)."

Morley v Automobile Club of Michigan, 458 Mich 459, 466-67; 581 NW2d 237 (1998)[10] (emphasis added).

Thus, in light of the plain language of §3142(2) and the pertinent decisions of this Court, a person who has not made a claim for the specific benefits at issue cannot be said to have reasonably relied on Lewis as the basis for any entitlement to benefits.

As to persons whose submitted claims have not been formally denied, the question is how long it is reasonable to wait before filing suit. It is of some relevance that the statute itself provides the answer. In addition, Lewis requires a claimant to proceed with "reasonable diligence or lose the right to claim the benefit of a tolling of the limitations period". 426 Mich at 102.

That being so, a claimant cannot reasonably rely on Lewis as a basis for waiting years before filing suit. On the other hand, waiting a few weeks or a couple of months beyond the one-year cutoff is not likely to result in the loss of a large amount of

[10]Reliance on the extreme extension of Lewis in Johnson fails for the same reasons.

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benefits.[11] Moreover, the larger the amount at issue, the less likely a claimant is to wait an extended period before waiting to judicially enforce her claim.

Against that possible marginal loss of benefits in a few cases, this Court must weigh the massive impact on the no-fault system of allowing litigants to present claims years after expenses are incurred. Although there may be some minimal harm in certain circumstances, that does not justify deviating from the general rule of allowing at least some retroactive effect to the decision in the instant case.

3. The Administration of Justice Will Be Positively Affected by Applying the Holding in the Instant Case to Cases Pending in the Trial Courts and to Cases Pending on Appeal in Which a Challenge to Lewis Has Been Raised and Preserved.

There is absolutely no systemic problem with applying the overruling of Lewis to cases pending in trial courts. The only substantive effect of doing so is either to limit the damages recoverable or (more rarely) to cause a dismissal of the entire claim, see e.g., Cameron v ACIA, 263 Mich App 95, 103; 687 NW2d 354 (2004), lv app pending. Neither effect imposes a burden on the system; both carry a possible benefit.

Limiting the amount of benefits at issue would increase the likelihood of settlement. A claim for $50,000 is facially more amenable to settlement than one for $5 million. Moreover, it is

[11]In the instant case, for example, Plaintiff will be barred from recovering benefits for the period from February 15, 2001, to November 12, 2001. She may pursue all benefits for losses incurred after the latter date.

self-evident that dismissal of stale claims is a positive boon to the judicial system.

Furthermore, applying the overruling of Lewis to such cases would have the additional effect of eliminating the necessity for litigating questions such as whether a claim was made for the benefits at issue, and whether a formal denial was actually communicated. Dispensing with such litigation-within-litigation is another systemic benefit.

Allowing application to those cases on appeal in which the issue has been raised and preserved is systemically neutral. The parties will have already invested the time and effort in perfecting and presenting the issue. An appellate court would not be asked to do anything other than to resolve it by applying current law. No remand or additional effort would be required.

In sum, even assuming that a decision favorable to ACIA raises a legitimate question of retroactive application, the purpose of the "new" rule cannot be effected by prospective application. Limited retroactive application to cases pending in trial courts and to cases pending on appeal in which the issue has been raised and preserved will not impose substantial harm on any reasonable reliance interest, and will have a net positive effect on the administration of justice.

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RELIEF

Defendant-Appellant, AUTO CLUB INSURANCE ASSOCIATION, prays this Honorable Court to reverse the July 7, 2004, order of the trial court in the instant case, and to remand with instructions that Plaintiff may recover only for losses incurred on or after November 12, 2001, one year prior to the filing of the Complaint.

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